

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 14, 2013 appellant, then a 65-year-old blade and vane repairer, filed an occupational disease claim alleging that he sustained pain in his right shoulder and ring finger in the performance of duty. He indicated that he operated the cleaning machine and it almost threw him and lost control. Appellant stated that he was very weak and almost passed out. He also noted that, when he informed the supervisor, he was told not to use the machine. Appellant alleged that his injury began on May 15, 2012 and that he first became aware of the injury on that date. His supervisor noted that appellant was on “some type of restriction and or light duty for as long as I have been supervisor. I have always advised him to work within his restrictions and have accommodated his restrictions.”

By letter dated March 18, 2013, the employing establishment controverted the claim. Cheri Anthony indicated that appellant had several injuries and surgeries. She noted that he had received over \$50,000.00 in schedule awards and disability payments since 2006. Ms. Anthony indicated that appellant’s current accepted conditions were trigger finger, lesion of ulnar nerve, carpal tunnel syndrome and tenosynovitis of the hand and wrist. She also noted that he had permanent impairment of left and right arms and explained that he had pain in the right finger for which he had surgery on August 31, 2012. Ms. Anthony challenged the claim due to the fact that appellant worked outside of his restrictions.

OWCP received a statement from appellant on March 18, 2013, which outlined his history, including his prior claims² and a daily activity check list.

By letter dated March 29, 2013, OWCP advised appellant that additional factual and medical evidence was needed. It explained that a physician’s opinion was crucial to appellant’s claim and allotted him 30 days to submit the requested information.

In an April 18, 2013 treatment note, Dr. Edward C. Brown, III, a Board-certified orthopedic surgeon, prescribed light duty with restrictions to include one handed work only.

OWCP also received an April 19, 2013 medical referral.

By decision dated May 20, 2013, OWCP denied appellant’s claim. It found that the medical evidence did not demonstrate that the claimed medical condition was related to established work-related events.

In an April 18, 2013 report, Dr. Brown noted that appellant was seen for right shoulder pain and weakness. He reviewed diagnostic tests and determined that x-rays revealed a mild calcification at the lateral tendons of the shoulder. Additionally, Dr. Brown noted that a magnetic resonance imaging (MRI) scan revealed evidence of supraspinatus tendinitis with evidence of a full-thickness rotator cuff tear. He noted that appellant related that he was using a

² The other claims include a March 14, 2006 injury that resulted in permanent impairment of the left and right arms under claim File No. xxxxxx743; a January 15, 2008 injury to include bilateral sensorineural hearing loss under claim File No. xxxxxx963; and a November 3, 2008 claim for right-sided disc protrusion T11-12, facet joint arthritis at L4-5 and L3-4, in claim File No. xxxxxx183. These other claims are not presently before the Board.

power buffer machine and had pain inside the shoulder. Dr. Brown also advised that appellant was complaining of some low back pain. He examined appellant and determined that regarding the right shoulder appellant had good elevation of the arm to about 140 to 150 degrees and some pain in the painful arc region. Dr. Brown reviewed x-ray reports and noted that they revealed some mild glenohumeral degenerative changes and some calcification at the lateral rotator cuff tendon. Additionally, he indicated that the MRI scan revealed evidence of a full-thickness supraspinatus rotator cuff tear that was small to moderate in size. Dr. Brown also noted that the studies were not available, merely the reports. He diagnosed right shoulder pain and weakness associated with a supraspinatus rotator cuff tear. Dr. Brown advised that they would try to “sort out whether this is a condition that is covered by his workers’ compensation number or if this is a condition that we have to treat under his own private insurance. In any event, I recommend that he have an arthroscopic rotator cuff repair and decompression and we will schedule this once we have appropriate approval.”

In a June 4, 2013 report, Dr. Brown noted that appellant was seen for complaints of right shoulder pain. He indicated that appellant was right-hand dominant and small framed. Dr. Brown diagnosed right shoulder symptomatic full-thickness supraspinatus rotator cuff tear. OWCP received physical therapy notes.

In a letter dated July 28, 2013, appellant again described the duties he believed contributed to his condition. He explained that it occurred when he used the cleaning machine and he was doing it for more than a year. Appellant indicated that his treating physician had provided the necessary information to support his claim.

On August 6, 2013 appellant requested reconsideration.

By decision dated August 16, 2013, OWCP denied appellant’s request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence or show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

ANALYSIS -- ISSUE 1

The evidence establishes that appellant was operating the cleaning machine and it almost threw him and he lost control. However, appellant submitted insufficient medical evidence to establish that his shoulder and ring finger condition was caused or aggravated by these activities or any other specific factors of his federal employment.

In support of his claim, appellant submitted an April 18, 2013 report from Dr. Brown who prescribed light duty with restrictions to include one handed work only. However, Dr. Brown merely prescribed restrictions and did not provide a diagnosis or an opinion regarding the cause of the reported condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁷

Consequently, the Board finds that this evidence is insufficient to establish appellant's claim. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁸ Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁹ Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.

As there is no reasoned medical evidence explaining how appellant's employment duties caused or aggravated a medical condition involving his spine, appellant has not met his burden of proof to establish a medical condition causally related to factors of his employment.

⁶ *Id.*

⁷ *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

⁸ *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

⁹ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁰ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [OWCP]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”¹¹

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹²

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for an injury in the performance of duty and timely requested reconsideration on August 6, 2013. The underlying issue on reconsideration is medical in nature, whether his shoulder and ring finger conditions were caused or aggravated by operating the cleaning machine or any other specific factors of his federal employment.

In support of his August 6, 2013 reconsideration request, appellant submitted an April 18, 2013 report from Dr. Brown who noted that appellant was seen for right shoulder pain and weakness. Dr. Brown noted that appellant had explained that he was using a power buffer machine and had pain inside the shoulder. He provided findings and diagnosed right shoulder pain and weakness associated with a supraspinatus rotator cuff tear. Dr. Brown also indicated that he was going to determine if appellant's condition was a workers' compensation injury. Thereafter, OWCP denied appellant's application on August 16, 2013, finding that no new evidence was offered warranting further merit review. However, the Board notes that the April 18, 2013 report from Dr. Brown constitutes relevant and pertinent new medical evidence not previously considered by OWCP. The Board notes that the only medical report received prior to the May 20, 2013 decision, was a treatment note in which Dr. Brown noted appellant's duty restrictions. As the April 18, 2013 report notes the history of injury and addresses whether

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b).

¹² *Id.* at § 10.608(b).

the condition is a workers' compensation injury, it is relevant and pertinent new evidence. Therefore, OWCP was obligated to conduct a merit review of the claim when appellant submitted this evidence in support of his reconsideration request.¹³ Reopening a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge his burden of proof.¹⁴ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁵ On remand it shall conduct a merit review of the entire record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

On appeal, appellant argued that his condition was work related. As noted above, this case is not in posture for decision. It is being remanded for a merit review of the claim. Appellant also submitted additional evidence on appeal. However, the Board has no jurisdiction to review this evidence for the first time on appeal.¹⁶

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty. The Board further finds that OWCP improperly refused to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

¹³ *D.M.*, Docket No. 10-1844 (issued May 10, 2011).

¹⁴ *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁵ *See Dennis J. Lasanen*, 41 ECAB 933 (1990).

¹⁶ The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed and the August 16, 2013 OWCP decision is set aside and remanded for further review consistent with this decision.

Issued: February 26, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board